Before the

Federal Communications Commission

Washington, D.C, 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

Comments of Digital Telecommunications Inc.
To Notice of Proposed Rulemaking
Released August 20, 2004

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Digital Telecommunications Inc., of Winona, Minnesota, ("DTI") submits these comments upon the Notice of Proposed Rulemaking in WC Docket No. 04-313/CC Docket No. 01-338. This proceeding is part of an ongoing proceeding familiarly known as the Triennial Review. It is in response to circumstances existing following the Court of Appeals' decision in United States Telecom Association v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004) (USTA II), pets. for cert. pending.

DTI urges the Commission, as addressed move fully below, to:

- At a minimum, divide the country between metropolitan area markets and non-metro and rural area markets for purpose of impairment anaysis.
- Promote stability and continuity in the transition to Section 271 UNEs.
- Address under the RFA the potential significant adverse economic impacts upon small CLECs.
- Allow adequate and flexible transitions.

DTI is a competitive local exchange carrier operating in Minnesota, Iowa, and Washington. It has entered into interconnection agreements with Qwest Communications, through which it is able to obtain unbundled network element ("UNE") services over Qwest facilities. It combines these UNEs with services that it provides over its own facilities or that it obtains from other carriers in order to render service to retail customers in these states. It provides these services to customers located primarily in rural areas and cities not part of a major metropolitan area.

Presently, the element package known as UNE-P (platform) is very important to DTI. The platform combines the customer loop, local switching and inter-office transport elements into a single ordering unit, which DTI then uses in rendering service to its customers. In most cases, and for practical purposes, Qwest is the only source of these elements in the territories where DTI operates. While in theory, DTI can construct its own comparable facilities to replace these elements, in reality there are numerous issues that must be addressed before this becomes feasible. These issues include the time frames for ordering and delivery of equipment; the need to obtain access rights to buildings and other real property; and the economic efficiencies of construction of own

facilities in comparison to lease or license of others' facilities. In many instances, DTI does not believe that it could replace UNE-P units with owned or competitively leased facilities within the six to twelve month transition period contemplated by the interim rule.

A. Granular Findings Regarding Impairment Are Necessary

As a small carrier operating in primarily rural areas, DTI is concerned that the Commission properly distinguish between the competitive environment in large metropolitan areas and everywhere else. The Court of Appeals initially told the Commission to examine competitive impairment for variations that could exist in different geographical markets.[1] The Court demanded a more nuanced concept of impairment than was reflected in the Commission's use of a single national market. 290 F.3d at 426. Impairment analysis must account for differences between large and small or urban and rural markets.

In its effort to address this, the Commission made a finding of nationwide impairment for mass market switching and transport, but created a mechanism for states to review this funding on a more granular basis. The USTA II court rejected this mechanism for state review and overturned the Commission's impairment funding because the Commission had not fully considered all factors that might justify finding no impairment in some market areas. The Court did not find there was no impairment on a nation wide basis, and it did not overrule its earlier requirement that impairment be considered on a granular basis. Thus, the Commission is left here with the need to

address the question of impairment while considering differences that exist in different parts of the United States.[2]

DTI is particularly concerned that the Court's order and the Commission's interim rule rest at least in part on the belief that some large, urban markets have significant competition. It fears that the circumstances in the largest metropolitan areas[3] in the United States will drive the answer to section 251 unbundling for the entire country, including for non-metro cities and rural areas. DTI is concerned that a necessary corollary finding will be lost in the process: Some, or all, small or rural market areas are more difficult to invest in, have inadequate competition, and under a proper impairment analysis, section 251 unbundled network elements must be provided in these areas.

Non-metropolitan areas have significantly different degrees of competition and penetration by CLECs than is found in larger metropolitan areas. In a recent study released by the Small Business Administration, survey data demonstrated that CLECs market share of 29% in metropolitan areas was much greater than their market share of 11% in non-metropolitan areas.[4] Moreover, small business customers in non-

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[1] United States Telecom Association v. Federal Communications Commission, 290 F.3d 415 420 (D.C. Cir. 2002) ("USTA I")

[2] The Commission has acknowledged that it "continues to search for unbundling rules that identify where carriers are genuinely impaired…." NPRM, ¶ 2. p. 2.

[3] The Court of Appeals has cited data from the 50 largest metropolitan markets. DTI is not proposing the precise boundary between large metropolitan areas and non-metro cities or rural areas. However, its experiences in Minnesota supports a demarcation point that distinguishes the twin cities of Minneapolis-St. Paul, and their suburban areas, which is plainly a large metropolitan area, from the remainder of the state, which has no other comparable metropolitan area. The largest cities in the state outside the Twin Cities, such as Rochester, Mankato, or Duluth, should be considered non-metro cities.

[4] S. Pociask, A Survey of Small Businesses' Telecommunications Use and Spending, (SBA Office of Advocacy, March 2004) 67, Fig. 49. In the survey, business owners were asked to determine for themselves whether or not they were in a

metropolitan areas tend to be smaller and spend less for telecommunications services, thus further shrinking the size of the non-metropolitan markets for telecommunication services relative to the size of the metropolitan area markets.[5] Smaller markets and a smaller share of such markets mean that there is a much greater likelihood of impairment in the absence of unbundled elements.

An illustration of how competition has worked out in non-metro areas can be seen through DTI's experiences in Mason City, Iowa. In Mason City, the Chamber of Commerce asked DTI to consider bringing high speed IP services into the community after the Chamber had no success encouraging the incumbent ILEC to offer such services. DTI found sufficient customer demand for the services and agreed to assist the Chamber.[6]

DTI invested several hundred thousand dollars in a colocation at the ILEC central office and in other equipment in order to bring these services to Mason City. This investment was before it ordered UNEs, including enterprise as well as mass market, loops, switching and transport from the ILEC. When the ILEC learned of DTI's intention to enter the Mason City market, the ILEC went forward with its own plans for such service improvements which it had heretofore failed to bring to Mason City. The ILEC

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metropolitan area. Id. at 7, n. 20. Thus, we cannot determine precisely what population levels represent the cut off for metropolitan areas here. Of a total sample size of 418 businesses, 244 considered themselves to be located in a metropolitan area and 174 considered themselves to be in a non-metro area. This indicates that those in small and medium sized cities, as well as those in rural areas, thought of themselves as non-metropolitan.

[5] Id. at 71.

[6] Customers demanded a single point of contact. Customer demand was thus based on a package of switched voice, dedicated voice and digital IP access. When DTI decided to enter the Mason City market, it brought its full market basket of local exchange services, which were particularly well suited to small businesses.

was able to delay turning on service to DTI UNEs until it was able to announce the offering of its new services. The ILEC then claimed it was first in the market with such high speed IP lines. DTI nonetheless has successfully competed for sufficient customers in the Mason City market to justify its investment there. But the Commission should note that DTI's ability to challenge the ILEL competively, to make this investment, and bring service to the customers was entirely dependent on the availability of UNEs obtained from the ILEC at TELRIC prices to combine with DTI's own equipment and reach the end use customers.

The ILEC system was built originally at a time when there was no competition for the telephone customer. It has been rebuilt, upgraded and enhanced several times since under the market rules of a regulated monopoly using a customer provided revenue stream. In order to enter the market today, the CLEC must invest substantial sums in a competitive market place, as illustrated in the Mason City example above, before it can serve even its first customer. If UNEs are not available, the CLEC would need to invest even greater sums to get to its first customer. While this may be a justifiable financial decision in some markets, it is not likely to be justified in other, smaller, or more costly or spacially diffused markets. While investment may occur in large metropolitan areas, the latter markets more likely describe rural areas and non-metro cities.

The Commission may be considering alternatives to wireline services as a solution to these barriers facing competitive entry into the local exchange. However, at present there are no complete substitutes for customer access over the copper wired loop. Wireless connectivity that can be used for the full package of services provided by DTI may be coming, but it is at least 5 to 10 years in the future. Wireless cannot presently

provide the security of the dial tone or the security of transmission. For example, DTI's experience with hospitals demonstrates the important of security over telecommunication facilities. As both telemedicine and patient confidentiality concerns have grown in recent years, hospitals have required a sufficiently secure line that cannot be presently offered over wireless facilities. DTI has needed to acquire UNEs from the ILEC to provide such service quality to its hospital customers.

In non-metro cities or rural market areas there is not sufficient alternative facilities and services available from alternative sources; and of necessity CLECs must go the incumbent local telephone company to get the facilities needed to reach their customers. The ILECs, finding themselves in the position of holding a monopoly on essential elements used for local service, will price these elements as they wish and will make it uneconomical or infeasible for CLECs to provide competitive services in such rural markets. Before the FCC gives up on the unbundled network element rules under section 251, it must distinctly and separately answer the necessity and impairment questions for small and rural market areas.

A possible solution to the problem of the Commission conducting a granular analysis of markets is to divide the nation into at least two functional markets: One market would be the metropolitan areas including and surrounding large cities, and the other would be the non-metropolitan areas and rural areas of the country. It may be possible in this analytical approach to divide further the metropolitan areas by looking at the largest cities individually and aggregating other relatively smaller metro areas or combining metro areas on the basis of regional or other commonalties. Because DTI

does not have extensive operations there, it leaves this analysis for others and the Commission.

Based on the available data, a sustainable finding of impairment can and must be made for the non-metro and rural areas. Factors such as the size of the markets and the CLECs' market share support a finding of impairment.[7] The knowledge that investment in new facilities is relatively less likely to occur in these areas is evidence that CLECs will have greater difficulty building their own facilities or obtaining facilities or services from other competitors instead of from the resident ILEC. Although some facilities investment may occur some places in non-metro America, it will be much more limited. In the absence of data to permit more granular breakdown of findings here, the extent and impact of this is not likely to outweigh the conditions present through out the non-metro and rural areas that support the impairment finding.

B. As the Commission Removes Section 251 UNEs, It Will Need to Address the Rates, Terms and Conditions for Section 271 UNEs.

The Commission has stated that it seeks comment on how section 271 UNEs fit into the Commission's unbundling framework. NPRM, ¶ 9, p. 6. Simply, listed elements found in section 271 will need to be independently offered when these same elements are no longer required under section 251. This has not been a problem up to the present because section 251 elements, and the telephone companies to which they applied, have overlapped and been inclusive of section 271 elements and telephone companies. If this

[7] The USTA II court acknowledged that impairment might be inferred from levels of competitive deployment of an element, but specifically limited this to when there was a "sensible definition of the markets in which deployment is counted." 359 F 3d at ____.

inclusiveness no longer applies, then the Commission is going to need to address how section 271 elements will be provided.

In order to avoid significant, and possibly catastrophic, disruption of the competitive markets in the local exchange and of CLECs themselves, the Commission must resolve the issues surrounding section 271 UNEs before it abandons the section 251 UNE system. It is not logical that UNEs mandated under section 271 should be offered under radically different rates, terms and conditions than section 251 UNEs are presently offered.

The Commission has stated that section 271 UNEs must be offered at just, reasonable and non-discriminatory rates. It contrasted these standards with the cost-based rate standard using TELRIC costing methodology being applied to section 251 UNEs. However, it should not lose sight of basic ratemaking principles: Just and reasonable rates should be based on cost. A proper concern of rate design is stability and continuity. Moreover, the Supreme Court has held that TELRIC is a proper measure of the cost of providing utility and telecommunication services. Verizon Communications Inc. v. Federal Communications Commission, 535 U.S. 467 (2002). From this it should be clear that there is nothing illogical or illegal about also using TELRIC methodology to set just and reasonable rates for section 271 UNEs. The issue for the Commission is whether the TELRIC method is the best policy, or, alternatively, whether it addresses all policy concerns that the Commission needs to consider, when setting rates for section 271 UNEs.

DTI submits that it is "adequately sensible" differentiate the largest metropolitan markets from, in the aggregate, non-metro and rural markets

In addition the Commission needs to address the terms and conditions under which section 271 UNEs are provided. Presently, the terms and conditions for offering UNEs are under the legal authority of section 251. Again, it is logical that just and reasonable terms and conditions for section 271 UNEs would be similar, if not identical, to those presently applied to section 251 UNEs. Such terms and conditions include, but are not limited to, the right to acquire combinations of UNEs as well as individual elements, rights of usage within CLEC operations, and the conditioning of lines.

C. CLECs Are Predominately Small Businesses That Will Be Disproportionately Harmed By Removal of Unbundled Network Elements.

The Commission is required by 5 U.S.C. §603 and 604 to address the possible significant economic impacts of its proposed rules on small businesses. Section 604 outlines what must accompany each final rule. The requirements include a statement of the need for and objective of the rule, a description of the small entities to whom the rule applies, and how the agency will minimize any significant economic impact on small entities. The Commission has included an Initial Regulatory Flexibility Analysis as an appendix with the NPRM. The IRFA fails to meaningfully address the economic impact of the proposed rule changes on small entities offering competitive telecommunications services.

The IRFA has identified that the purpose for the rule is to examine comprehensively the circumstances under which ILECs must make UNEs available to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2) of the Telecommunications Act. It further stated that it must create "a legally sustainable

impairment standard and applying that standard to individual network elements." App. IRFA p. 1.

The Commission has addressed itself extensively to who are the small entities for which it must consider the economic impact of the rule. Among the entities are small business ILECS and CLECs. The Commission's concern appears to be that telecommunication services providers in each of different categories are predominately small entities. It has only briefly address the impact of the rule on small businesses. The Commission has thus avoided discussing any significant adverse impact on small CLELs. This is unfortunate and incorrect. The Commission needs to address how the enormous adverse impact of these rule changes will fall disproportionately on small businesses.

The present package of UNEs for mass-market services allows small business entities to operate. They have been able to start new businesses, enter new markets, seek new customers and create competition for telecommunication services in retail markets that would not otherwise exist in the absence of the UNEs. Competitive LECs have brought to the market innovation and increases in the level and quality of customer service and have lowered prices.[8] The viability of the entire small business sector represented by CLECs is jeopardized if UNEs are denied to them.

Removing the opportunity to lease UNEs at TELRIC prices will change the basic business model in existence today. Without the availability of switching and transport

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[8] The Office of Advocacy of the United States Small Business Administration raised similar concerns in 2003. Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, USSBA, to Michael K. Powell, Chairman, FCC, (February 5, 2003) submitted in CC Docket no. 01-338; 96-98; 98-147. Although CLECs may have gained market share since then, neither the amount of increase nor the market share are of such magnitude to change this analysis. This is particularly true for non-metropolitan markets,

elements, many small CLECs will need to change materially their business model or cease operations. Competitive entry will be discouraged and the movement toward greater competition will be reversed. In the most dire picture of consequences from an erroneous decision, local wireline service may return to a monopoly. The adverse impact will not only fall upon CLECs, but will extend to the small business customer as well.

The Commission needs to consider the relative severity of consequences to the small business CLECs in contrast to any alleged adverse effect of alternatives upon the large entities, such as the four RBOCs, who will benefit most from the proposed rule changes. If the Commission errs in its belief that competition will still expand if unbundled elements are removed, the harm to the CLECs will be irreparable. A finding of no impairment when in fact there is impairment will force CLECs out of business. Those CLECs likely will not return if unbundled elements are eventually restored. On the other hand, an erroneous finding of impairment if there is no impairment will impact the ILECs to a much lesser extent. ILECs will possibly face more competitors and possibly be less succesful in competing for some customers with some CLECs. At the same time, ILECs will be selling unbundled elements and will be receiving revenue for such sales. Most importantly, there is virtually no scenerio that has the ILECs going out of business because of an erroneous impairment finding.

The Commission should address alternatives here that can best avoid the risk of error if UNEs are removed. The RFA requires that it thoroughly address to the economic impact upon small entities. It can mitigate against the adverse consequences to small CLECs by taking steps outline in these comments.

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where the CLEC portion of market share in 2004 in reported to be 11%, in contrast to the

D. Small, Rural CLECs Need A Longer Transition From the Present UNEs To the Future Environment.

If the Commission abandons the existing system of UNEs in favor of a system either based primarily on owned facilities based competition or one based on a hybrid of section 251-based UNEs, section 271-based UNEs, and owned facilities, the transition from the present to the future is extremely important to a small CLEC such as DTI. A transition period must give account to the steps needed to adjust business plans and operations; secure capital financing; engineer networks; order, deliver and install equipment; and facilitate customer transitions caused by all of the preceding steps.

A transition to any of several possible rules emphasizing facilities-based competition should allow for differences in the size of the service area. In major metropolitan areas or those served by tandem switching, a transition retaining UNEs and making incremental adjustments in rates could be done over a period of 18 to 24 months. In medium or small sized cities or areas served by a sub-tandem switch, a transition period could be 24 to 36 months. In rural areas or where no tandem switch is present, a transition period of up to 48 months should be considered. A tiered transition schedule will better permit the planning, the equipment supply, and the retail demands to respond to these monumental changes and will promote stability as well as positive change brought forth by competitive forces.

In summary, the choices of today are between a telecommunication services market based on competition versus one of oligopoly or monopoly. If the rules drive out

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10% market share figure mentioned in Mr. Sullivan's letter at page 4.

small competitors today or keep small competitors from easily entering markets in the future, even inadvertently, the Commission will be choosing in the long run more regulation, higher consumer costs, and less economic efficiency.

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